who did not possess protected characteristics. (R2-41 (Della-Loggia Dec.) -5 (& 6) (¶¶ 9, 11).) Through discovery, EquiCredit produced Home Disclosure Act ("HMDA") data for 410 loan applications to EquiCredit/NationsCredit between June 1, 2000 and August 15, 2001, in the Buffalo, New York, area. (R2-41 (Della-Loggia Dec.) -8 (¶ 14) and Exh. C.) Of the applicants who reported their race and whose applications were denied, 45% were African-American and 52% were Caucasian. (*Id.* (¶ 15) and Exh. C.) Similarly, of the applicants who reported their sex and whose applications were denied, 40% were female and 58% were male. (*Id.*) Thus, instead of supporting Petitioner's claim of discrimination, this information completely undercut her claim and failed to establish that similarly-situated applicants who did not possess protected characteristics obtained loans. (Pet. App. B (District Court's May 23, 2005 Opinion) at 12a-13a.)

B. Petitioner's Statement of the Case Contains Misstatements of Facts.

The rules of the Court instruct counsel to "address any perceived misstatement of fact . . . in the petition that bears on what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2. As in the proceedings below, Petitioner has attempted to incorporate into her Statement of the Case facts that are not in evidence. Petitioner makes conclusory assertions, including statements regarding EquiCredit's knowledge, without citing any supporting evidence. Petitioner also makes statements that are materially incomplete because she has omitted relevant facts that were established during her deposition as well as through other evidence on the record. Petitioner ignores the evidence demonstrating that EquiCredit did not know Petitioner's race, sex, or the racial demographics of the neighborhood

surrounding the property at issue when it denied Petitioner's loan application (Doc 44 (Boykin Depo.) - Pgs 22, 26-27, 30-32, 63; R2-41 (Della-Loggia Dec.) -3 (& 4) (¶¶ 6-7).) EquiCredit addresses below specific misstatements of fact made, followed by a more complete summary of the record established in this case.

As in the court below, Petitioner states, without citing evidence, that she "applied on June 29, 2001, for a real estate refinancing loan from respondent for rental property she owns in Buffalo, New York." (Pet. at 2; *see also* Appellant Br. at 7.) This statement of the case is misleading because, as reflected in the record, Petitioner in fact never informed EquiCredit that the property at issue was to be used solely as rental property or that she did not plan to reside at such property. (Doc 44 (Boykin Depo.) - Pgs 28-29.)

Petitioner also states without citing any evidence, as she did in the court below, that "she had been approved for a loan in the amount of $28,000 based on her credit report." (Pet. at 2; *see also* Appellant Br. at 7.) Nowhere is there any evidence in the record that EquiCredit ever approved Petitioner for a loan. In fact, the undisputed evidence is to the contrary. During Petitioner's initial telephone contact with EquiCredit, she was informed that her credit rating was sufficient to qualify for a loan but that in order for her loan to receive final approval, EquiCredit would have to receive further documentation from Petitioner and a satisfactory appraisal of the Property. (Doc 44 (Boykin Depo.) - Pgs 24-26.) Before EquiCredit ordered an appraisal, however, EquiCredit determined that the proposed loan would constitute a "high-cost loan" under New York Banking Department Regulations - a sequence of events that Petitioner does not dispute. (R2-41 (Della-Loggia Dec.) -5 (& 6) (¶ 9);

R1-1 (Compl.) -4 (¶9); App. Br. at 5.) Furthermore, Petitioner's unsupported statement that she had "complied with all of respondent's requests to complete the processing of her loan application" (Pet. at 3) is misleading because it suggests EquiCredit had completed the processing of her loan application where the evidence instead shows that the process was never completed because the appraisal was never ordered and Petitioner's loan never approved. (R2-41 (Della-Loggia Dec.) -4 (¶ 7); R1-1 (Compl.) -4 (¶ 10); Doc 44 (Boykin Depo.) - Pgs 35-36.)

Petitioner also makes conclusory assertions and contentions questioning the New York Division of Human Rights ("DHR")'s investigation and conclusions of her administrative complaint that lack any support from the evidentiary record and instead are based only on Petitioner's self-serving "reviewing [of] DHR's administrative file on her case." (Pet. at 3.) Petitioner asserts that the New York DHR's investigation was incomplete and inadequate. To the contrary, the New York DHR dismissed Petitioner's administrative claim after completing a thorough investigation, concluding that "[t]he investigation did not reveal any evidence to suggest Complainant had been discriminated against. Complainant's loan application was declined as costs exceeded Respondent's guidelines, a legitimate, non-discriminatory business reason." (Pet. App. C (New York DHR's Determination and Order) at 16a.) The following section sets forth a more complete summary of the facts in the record.

C. Summary of Record Facts

1. Petitioner Submitted a Race-Blind Loan Application.

Petitioner is an African-American female who is proceeding *pro se* in this litigation. (R1-1 (Compl.) -2 (¶ 2).) From 1976 to 1998, Petitioner was employed by the U.S. Department of Housing and Urban Development, most recently as a civil rights analyst. (Doc 44 (Boykin Depo.) - Pg 10.)

Petitioner submitted the loan application at issue in this case to EquiCredit. (R2-41 (Della-Loggia Dec.) -2 (& 3) (¶¶ 3-4); District Court's May 23, 2005 Opinion at 8a n.1.) On June 29, 2001, Petitioner contacted the Jacksonville headquarters of EquiCredit Corporation of America by telephone to apply for a home loan secured by a residence at 81 Walden Avenue, Buffalo, New York 14211 (the "Property"). (R1-1 (Compl.) -4 (¶ 6); Doc 44 (Boykin Depo.) - Pgs 12, 20-21.) Petitioner sought the loan in order to fund improvements to the Property. (R1-1 (Compl.) -4 (¶ 6); Doc 44 (Boykin Depo.) - Pg 21.) At the time of her loan application to EquiCredit, Petitioner was an existing home loan customer of two different Bank of America companies. (R1-1 (Compl.) -4 (¶ 6); Doc 44 (Boykin Depo.) - Pgs 15-16, 19-20; R2-41 (Della-Loggia Dec.) -8 (¶ 14).)

EquiCredit received Petitioner's telephone application and made all underwriting credit decisions on her loan from its home offices in Jacksonville, Florida. (R2-41 (Della-Loggia Dec.) -4 (¶ 7); Doc 44 (Boykin Depo.) - Pgs 15-16, 19-20.) During Petitioner's initial telephone contact with EquiCredit, she was informed that her credit rating was

sufficient to qualify for a loan but that in order for her loan to receive final approval, EquiCredit would have to receive further documentation from Petitioner and a satisfactory appraisal of the Property. (Doc 44 (Boykin Depo.) - Pgs 24-26.)

On July 20, 2001, Petitioner mailed supporting documentation for her loan application to EquiCredit. (R1-1 (Compl.) -4 (¶ 7).) This documentation did not reveal Petitioner's race, sex, or the racial demographics of the area surrounding the Property. (Doc 44 (Boykin Depo.) - Pgs 30, 32, 63; District Court's May 23, 2005 Opinion at 8a.) During the entire loan application process, Petitioner never disclosed to EquiCredit her race or the racial makeup of the neighborhood of the property at issue. (R2-41 (Della-Loggia Dec.) -3 (& 4) (¶ 6); Doc 44 (Boykin Depo.) - Pgs 22, 26-27, 30-32.) Furthermore, nothing in EquiCredit's loan application file indicates that any EquiCredit representative was aware of Petitioner's race or the racial makeup of the neighborhood or surrounding area during the loan application and decision process. (R2-41 (Della-Loggia Dec.) -3 (& 4) (¶ 6); Doc 44 (Boykin Depo.) - Pg 25.) In the ordinary course of loan underwriting, EquiCredit's only source of information about the Property or surrounding neighborhood in Buffalo, New York, would have been an appraisal report, which EquiCredit never received for Petitioner's loan application. (R2-41 (Della-Loggia Dec.) -4 (¶ 7).) EquiCredit never received an appraisal report or any other information regarding the Property or the surrounding neighborhood because EquiCredit reached its decision to deny Petitioner's loan application before ordering an appraisal of the Property. (*Id.*)

2. EquiCredit Denied Petitioner's Loan Application Based on EquiCredit's Determination That the Loan Would Be a "High-Cost Loan" Under New York Banking Regulations.

At the time of Petitioner's loan application in June 2001, EquiCredit had a written credit policy that EquiCredit would not make a loan which could be considered a "high-cost loan" under New York law. (R2-41 (Della-Loggia Dec.) -5 (¶ 8); District Court's May 23, 2005 Opinion at 8a n.2.) EquiCredit's policy is set forth in EquiCredit's Consumer Finance Group Compliance Bulletin #00-013 as follows:

> Due to the extreme complexity of this [New York] legislation, the severe penalties associated with non-compliance and the huge reputation risks associated with it, CFG Consumer Real Estate [i.e., EquiCredit and NationsCredit] has decided that we will not originate or purchase any "high cost" home loans in New York.

(R2-41 (Della-Loggia Dec.) -5 (¶ 8) and Exh. A, at 1.) As set forth on the third page of this Bulletin, a loan can be considered "high cost" under New York Banking Department Regulations if the closing costs for the loan exceed five percent (5%) of the loan amount. (*Id.*; *see also* State of New York Banking Regulation 41.1(e)(6)(iii).)

Petitioner applied for a loan in the amount of $28,000 with estimated closing costs of $1,784.50, which would have constituted approximately 6.4% of the loan amount. (R2-41 (Della-Loggia Dec.) -5 (& 6) (¶ 9) and Exh. B; Doc 44 (Boykin Depo.) - Pgs 74-75; District Court's May 23, 2005 Opinion at 8a n.2.) As a result, EquiCredit determined that

the proposed loan could constitute a "high-cost loan" under New York Banking Department Regulations and declined to make the loan to Petitioner. (R2-41 (Della-Loggia Dec.) -5 (& 6) (¶ 9); R1-1 (Compl.) -4 (¶ 9).) EquiCredit's decision to deny Petitioner's loan application was based solely on EquiCredit's interpretation of New York Banking Department Regulations. (R2-41 (Della-Loggia Dec.) -5 (& 6) (¶ 9).)

During the proceedings below, Petitioner asserted that the New York regulations regarding high-cost loans did not apply to her loan because the Property was rental property instead of her principal residence. Petitioner never informed EquiCredit that the Property was to be used solely as rental property or that she did not plan to reside at the Property. (Doc 44 (Boykin Depo.) - Pgs 28-29.) The documents in EquiCredit's file for Petitioner's loan application indicate that when EquiCredit concluded the loan would be a high-cost loan under New York law, EquiCredit was not asked to and did not consider that Petitioner might intend the Property to be used as income producing rental property. (R2-41 (Della-Loggia Dec.) -6 (¶ 10); Doc 44 (Boykin Depo.) - Pg 55.) At no point during the application process, did Petitioner raise this point with EquiCredit. (R2-41 (Della-Loggia Dec.) -6 (¶ 10); Doc 44 (Boykin Depo.) - Pg 55.)

EquiCredit's denial of Petitioner's loan application was based solely on its belief that the amount of the closing costs in relation to the amount of the proposed loan caused the loan to be a high-cost loan under New York law in violation of EquiCredit's lending policies. (R2-41 (Della-Loggia Dec.) -5 (& 6) (¶¶ 9, 10).) Petitioner even acknowledged in the proceedings below that EquiCredit's underwriters "considered" and "thought" Petitioner's loan application was a "high cost" loan under New York law. (Appellant Br. at

16; R3-46-2 (Memo. of Law) -5.) EquiCredit's decision to deny Petitioner's loan application was not based on Petitioner's race, sex, the racial makeup of the neighborhood where the property was located, or any other protected characteristic. (R2-41 (Della-Loggia Dec.) -5 (&6) (¶¶ 9, 10).) EquiCredit did not apply the New York regulation differently to similarly-situated loan applicants who did not possess protected characteristics. (*Id.* (¶¶ 9, 11).)

On July 25, 2001, EquiCredit contacted Petitioner by telephone to inform her that EquiCredit had denied her loan application based upon its determination that the loan would be a high-cost loan under New York law. (R1-1 (Compl.) -4 (¶ 10); Doc 44 (Boykin Depo.) - Pgs 35-36; District Court's May 23, 2005 Opinion at 8a.) In August 2001, Petitioner received written confirmation that the loan was denied because of EquiCredit's policy against making high-cost loans under New York law. (R1-1 (Compl.) -4 (¶ 10); Doc 44 (Boykin Depo.) - Pg 34; District Court's May 23, 2005 Opinion at 8a.) Despite being informed as to why her loan was rejected, Petitioner did not tell EquiCredit that the Property was not to be used as her primary residence or contend that the New York regulation did not apply. (Doc 44 (Boykin Depo.) - Pg 34.)

3. Subsequent Investigation by HUD and DHR Concluded No Evidence of Discrimination.

On or around August 8, 2001, Petitioner filed an administrative complaint with the U.S. Department of Housing and Urban Development ("HUD") against Equicredit, which was referred to the New York DHR. (Doc 44 (Boykin Depo.) - Pg 36.) After completing a thorough investigation, the New York DHR dismissed Petitioner's claim, concluding that "[t]he

investigation did not reveal any evidence to suggest Complainant had been discriminated against. Complainant's loan application was declined as costs exceeded Respondent's guidelines, a legitimate, non-discriminatory business reason." (*Id.* - Pgs 41-42 and Exh. 8.)

II. Proceedings Below

After the New York DHR dismissed Petitioner's claim and concluded its investigation revealed no evidence that EquiCredit discriminated against Petitioner, on November 14, 2003, Petitioner filed this lawsuit against EquiCredit, HUD, and the New York DHR. Petitioner's complaint alleged that EquiCredit discriminated against her on the basis of her race, the racial makeup of the neighborhood where the property is located, and her sex, in violation of the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*, ("FHA"), § 1981 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* ("Title VI"), and the Equal Credit Opportunity Act, 15 U.S.C. § 1691 ("ECOA"). Petitioner also brought claims under the FHA, Title VI, and the Fifth and Fourteenth Amendments to the U.S. Constitution against HUD and the New York DHR.

By an Order entered June 10, 2004, the district court granted in part EquiCredit's motion to dismiss and dismissed all of Petitioner's claims against EquiCredit except her claim under the FHA. (R1-17-5 (& 6).) The district court also dismissed Petitioner's claims against HUD. On September 29, 2004, the district court granted Petitioner's motion for entry of default against DHR for failure to answer or otherwise respond to the Complaint. (R1-27-3.)

EquiCredit moved for summary judgment on Petitioner's remaining FHA claim, and Petitioner moved for summary judgment and partial summary judgment.[1] By an Order entered May 23, 2005, the district court granted EquiCredit's motion for summary judgment, denied Petitioner's motion for summary judgment and partial summary judgment, and dismissed this action. (District Court's May 23, 2005 Opinion at 14a.) The district court concluded that Petitioner had failed to meet her burden because there was no direct evidence of discrimination and she could not establish a prima facie case of discrimination. The district court further concluded that even if Petitioner could establish a prima facie case, her remaining FHA claim nonetheless failed because the undisputed facts demonstrated that EquiCredit had denied her loan application for a legitimate, nondiscriminatory, nonpretextual reason and she had failed to meet her burden by rebutting EquiCredit's reason.

Unsatisfied with the district court's disposition of her case, on June 21, 2005, Petitioner filed a Notice of Appeal appealing the district court's grant of summary judgment in favor of Bank of America, N.A. and EquiCredit, denial of Petitioner's motion for summary judgment and partial summary judgment, and dismissal of this action. (R4-61-1.)

On appeal to the Eleventh Circuit, Petitioner contended the following: (1) the district court applied the wrong prima facie elements in resolving her claim, and (2) to make out her claim, she did not need to show that EquiCredit continued to approve loans for non-minority applicants with credit qualification and loan details nearly identical and significantly parallel to hers,

1. Petitioner directed the majority, if not all, of the arguments in her motion for summary judgment and partial summary judgment to the investigation undertaken by HUD and DHR subsequent to EquiCredit's denial of Petitioner's loan application.

because that standard would be virtually impossible to meet; (3) assuming the court used the correct prima facie elements, she provided evidence sufficient to satisfy such elements; and (4) she proved that EquiCredit's legitimately non-discriminatory reason - that her loan was a "high-cost" loan under New York state law and, as such, was in violation of EquiCredit's written lending policy - was a pretext for discrimination. *Boykin v. Bank of Amer. Corp.*, 162 Fed. Appx. 837, 838 (11th Cir. 2005) (per curiam).

On December 21, 2005, the Eleventh Circuit affirmed summary judgment in favor of Bank of America, N.A. and EquiCredit. The Opinion affirmed the district court's determination that Petitioner had failed to establish a prima facie case of discrimination and affirmed the district court's conclusion that, even assuming Petitioner had established a prima facie case, her FHA claim would fail because EquiCredit had proffered a legitimate nondiscriminatory reason for denying Petitioner's loan and Petitioner had failed to show that reason was merely a pretext for discrimination.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of any Court of Appeals or this Court nor do they implicate a federal question that has not been, but should be, decided by this Court. Instead, this case presents a fundamental failure of factual proof by Petitioner and Petitioner's unwillingness to accept the determinations by the courts below that she lacks any evidence to support her claim of discrimination. Accordingly, Petitioner has not carried her burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. Petitioner Has Failed to Show that the Decisions Below Conflict with a Decision of Any Court of Appeals.

A. The Decisions Below Do Not Create a Circuit Split Regarding Application of the *McDonnell Douglas* Analysis.

The *McDonnell Douglas* burden-shifting framework established by this Court assists plaintiffs in discrimination cases who cannot rely on direct evidence of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). Petitioner acknowledges that the *McDonnell Douglas* framework set forth a four-prong analysis for establishing a prima facie case of discrimination in the context of employment discrimination. (Pet. at 5-6.) Petitioner acknowledges this Court's direction that the analysis should be flexible and applied on a case-by-case basis. (Pet. at 7.) As also acknowledged by Petitioner and consistent with the Court's guidance, lower courts have adapted the *McDonnell Douglas* framework to analyze housing and lending discrimination claims. (Pet. at 5-6.)

Petitioner's theory that the Eleventh Circuit's Opinion creates a Circuit split by using the fourth element of this analysis for establishing a prima facie case of lending discrimination is wrong. Petitioner's faulty theory relies on two district court opinions from the Northern District of Ohio that are inapposite to opinions from other Circuit Courts as shown below. (Pet. at 6) (citing *Steptoe v. Sav. of Amer.*, 800 F. Supp. 1542 (N.D. Ohio 1992); *Old West End Ass'n v. Buckeye Fed. Sav. & Loan*, 675 F. Supp. 1100 (N.D. Ohio 1987).) Petitioner's theory has also been discredited by a sister district court in the same Circuit and limited as not having "been used anywhere besides the Northern District

of Ohio." *Latimore v. Citibank*, 979 F. Supp. 662, 667 (N.D. Ill. 1997), *aff'd*, 151 F.3d 712 (7th Cir. 1998). Furthermore, contrary to Petitioner's suggestion that the Seventh Circuit "generally disapproved" of the fourth element under the *McDonnell Douglas* analysis, the Seventh Circuit has included the fourth element as part of the *McDonnell Douglas* prima facie analysis. *Latimore*, 151 F.3d at 715. Contrary to Petitioner's theory, the application of the fourth element has been consistent throughout Circuits that have applied the *McDonnell Douglas* framework in the context of housing and lending discrimination. *See, e.g., Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d 890, 893 (1st Cir. 1992) (applying *McDonnell Douglas* analysis to ECOA claim using four prima facie elements); *Mitchell v. Shane*, 350 F.3d 39, 47 (2nd Cir. 2003) (applying *McDonnell Douglas* analysis to housing discrimination claims under FHA using four prima facie elements); *Hood v. Midwest Sav. Bank*, 95 Fed. Appx. 768 (6th Cir. 2004) (applying *McDonnell Douglas* analysis to FHA and ECOA claims in context of loan application denial and using four prima facie elements); *Allen v. Muriello*, 217 F.3d 517, 520-22 (7th Cir. 2000); *Rowe v. Union Planters Bank*, 289 F.3d 533, 535 (8th Cir. 2002) (applying *McDonnell Douglas* analysis to FHA and ECOA claims and using four prima facie elements); *Gamble v. City of Escondido*, 104 F.3d 300 (9th Cir. 1997) (applying *McDonnell Douglas* analysis to FHA claims and using four prima facie elements); *Matthiesen v. Banc One Mortgage Corp.*, 173 F.3d 1242, 1246 (10th Cir. 1999) (applying *McDonnell Douglas* analysis to ECOA claim and using four prima facie elements). Similarly, the Eleventh Circuit has consistently applied the fourth element. *See Boykin v. Bank of Amer. Corp.*, 162 Fed. Appx. 837, 839 (11th Cir. 2005) (per curiam); *Cooley v.*

Sterling Bank, 280 F. Supp.2d 1331, 1339 (M.D. Ala. 2003), *aff'd per curiam*, 116 Fed. Appx. 242 (11th Cir. 2004).[2]

Petitioner's suggestion that the *McDonnell Douglas* analysis may not be suitable in the context of lending discrimination is contrary to a long line of precedent.[3] (Pet. at 6 (citing *Latimore v. Citibank*, 151 F.3d 712 (7th Cir. 1998) and *Crawford v. Signet*, 179 F.3d 926 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1145 (Jan. 24, 2000)).) As noted above, this Court has invited lower courts to apply the *McDonnell Douglas* requirements in numerous contexts. Circuit courts addressing the issue of discrimination in the context of FHA claims, including the Seventh Circuit referenced by Petitioner, either uniformly have applied *McDonnell Douglas* or have acknowledged its potential applicability. HUD also has adopted *McDonnell Douglas* "for evaluating claims of discrimination under the Fair Housing Act." *United States v. Badgett*, 976 F.2d 1176, 1178 (8th Cir. 1992) (citing *United States Dep't of Hous. & Urban Dev. ex rel. Herron v. Blackwell*, 908 F.2d 864 (11th Cir. 1990)).

---

2. In discussing its use of the fourth element, the Eleventh Circuit explained that a bank's underwriting guidelines may be more stringent than the guidelines that generally "qualify" a loan applicant, so the mere denial of an application to a "qualified" minority would not alone raise an inference of discrimination. The fourth element is needed to show the lender continued to approve loans to similarly situated non-minority applicants. *Boykin v. Bank of Amer. Corp.*, 162 Fed. Appx. 837, 840 (11th Cir. 2004) (per curiam).

3. In addition, Petitioner waived this argument by failing to raise it before the District Court or the Eleventh Circuit. *See United States v. Bean*, 537 U.S. 71, 75 n.2 (2002) (holding argument was "waived" because it was "raised for the first time in his brief on the merits to this Court").

II. Petitioner Has Failed to Show that the Decisions Below Conflict with a Decision of This Court.

Petitioner hypothesizes that the Eleventh Circuit's Opinion conflicts with decisions of this Court but fails to cite any conflicting Supreme Court decision. Instead, the Petition is no more than a veiled attempt by Petitioner to have the Court review and reconsider the evidence she presented below.

A. Petitioner Has Not Shown that the Lower Courts' Decisions Were Inconsistent with this Court.

The courts below correctly applied the evidentiary burdens framework developed by this Court in *McDonnell Douglas*. Contrary to Petitioner's sweeping characterizations, her Petition fails to show that the decisions below conflict with a decision of this Court. Petitioner cites several Supreme Court decisions, each of which is consistent with the standard and burdens applied below. (*See* Pet. at 7-11.)

Petitioner acknowledges this Court's development in *McDonnell Douglas* of a burden-shifting framework that requires a plaintiff to establish a prima facie case of discrimination based on the application of four elements on a case-by-case basis. (Pet. at 7 (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).) Petitioner mischaracterizes *McDonnell Douglas*, however, by stating that "[a] showing that other applicants were considered for the job after plaintiff suffices to show circumstances giving rise to an inference of discrimination." (Pet. at 8.) This assertion is a mischaracterization because it fails to recognize that in establishing a prima facie case of

discrimination, the comparators must not just be "other applicants," as asserted by Petitioner, but must have *similar qualifications* as the plaintiff. *See McDonnell Douglas*, 411 U.S. at 802. The Eleventh Circuit's application of the *McDonnell Douglas* standard as requiring Petitioner to show comparators with similar qualifications to establish the fourth element of her prima facie case was thus consistent with the decisions of this Court.

Perhaps most important, Petitioner acknowledges the proper evidentiary burdens imposed by the lower courts in her case. Petitioner acknowledges that, assuming she established a prima face case and EquiCredit offered a legitimate, nondiscriminatory reason for its decision, the burden shifted back to Petitioner to show that EquiCredit's reason was a pretext for discrimination. (Pet. at 9 (citing *Burdine*).) Petitioner acknowledges that once a defendant satisfies the burden of proffering a legitimate, non-discriminatory reason, any presumption of discrimination arising from a prima facie case "drops out of the picture." (Pet. at 9 (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).) While the *McDonnell Douglas* burden-shifting framework eases the burden of production for a plaintiff in a discrimination case, it never eases a plaintiff's burden of persuasion. (Pet. at 9 (citing *St. Mary's*).)

B. Petitioner is Improperly Seeking Another Review of the Evidence.

Rather than dispute the evidentiary burdens applied by the lower courts, Petitioner's certiorari petition is nothing more than a request for this Court to reconsider and reevaluate the evidence she presented below. As shown below, Petitioner seeks another review of the evidence after the lower courts

determined that (1) the evidence failed to establish a prima facie case; (2) the evidence showed EquiCredit met its burden of proffering a legitimate, nondiscriminatory reason for its decision; and (3) the evidence showed Petitioner did not meet her burden of showing pretext.

Such a request not only fails to provide a "compelling reason" required for certiorari review, but it is an altogether inappropriate basis for a petition for certiorari. *See* Sup. Ct. R. 10.[4] Furthermore, the lower courts properly considered the evidence in the record despite Petitioner's misconstructions in her Petition and in her previous briefs to the lower courts.

1. Petitioner Seeks Another Review of the Evidence After the Lower Courts Determined that the Evidence Failed to Establish a Prima Facie Case.

Unable to show that the courts below applied incorrect burdens, Petitioner theorizes that the courts below did not satisfactorily consider her purported evidence in determining whether the parties had met their burdens. Petitioner first complains that, "applying **the Court's analysis** for establishing a prima facie case of discrimination," the lower courts failed to properly assess or consider her purported evidence in determining Petitioner failed to establish a prima facie case with respect to the fourth element of the *McDonnell Douglas* prima facie analysis. (Pet. at 8 (emphasis added).) Without any citation to the evidentiary record, Petitioner claims her evidence satisfied the fourth element for a prima

4. *See also* Sup. Ct. R. 10 (petitions rarely granted "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

facie case but that the Eleventh Circuit "erroneously analyzed" and "failed to consider" portions of her purported evidence. (Pet. at 8 (citing *Boykin v. Bank of Amer. Corp.*, 162 Fed. Appx. 837, 840 (11th Cir. 2005) (per curiam)).)

Petitioner simply is wrong. Petitioner's allegations of discrimination based on her race, the racial makeup of the neighborhood, or her sex were refused complete by the undisputed evidence that (i) none of the documents relied on by EquiCredit to make its decision indicated Petitioner's race, sex, or the racial demographics of the area surrounding the Property (District Court's May 23, 2005 Opinion at 8a, 14a); (ii) during the loan application process Petitioner did not disclose to EquiCredit her race or the racial makeup of the neighborhood of the property at issue (*Id.* at 8a, 14a); and (iii) EquiCredit's decision to deny Petitioner's loan application was based solely on EquiCredit's interpretation of New York Banking Department Regulations and EquiCredit's belief that the amount of closing costs in relation to the amount of Petitioner's proposed loan would result in a "high-cost loan" under New York law in violation of EquiCredit's underwriting policies. (R2-41 (Della-Loggia Dec.) -5 (&6) (¶¶ 8-10) and Exhs. A and B; R1-1 (Compl.) -4 (¶¶ 9-10); Doc 44 (Boykin Depo.) -Pgs 34, 35-36, 74-75; R3-51 (Stmt. Mat. Facts) -2 (&4) (¶¶ 21-25, 33-34).)

Thus, by the time of summary judgment, Petitioner had nothing but the HMDA data produced in discovery by EquiCredit to support some apparent red-lining theory in her attempt not only to satisfy the fourth element of her prima facie case but also to support her prima facie case. (Appellant Br. at 14; District Court's May 23, 2005 Opinion at 12a-13a.) As set forth above, this HMDA data does not establish any pattern or practice of discrimination. (District Court's

May 23, 2005 Opinion at 12a-13a.) To the contrary, the data shows that EquiCredit did not make decisions to deny loan applications on the basis of race or any other protected characteristic. Petitioner's problem is not that the courts below failed to consider her "evidence," but rather there is absolutely no evidence to support her claim.

2. Petitioner Seeks Another Review of the Evidence After the Lower Courts Determined that the Evidence Showed EquiCredit Met Its Burden of Proffering a Legitimate, Nondiscriminatory Reason for Its Decision.

Petitioner then claims that, applying the Court's burden-shifting analysis, the lower courts improperly analyzed and "clearly failed to evaluate all of the evidence" in determining EquiCredit met its burden of proffering a legitimate, nondiscriminatory reason for its decision. (Pet. at 9.) Petitioner's assertions have no basis in the record. EquiCredit's burden is "exceedingly light." *Sanders v. City of Montgomery*, 319 F. Supp.2d 1296, 1312 (M.D. Ala. 2004) (quoting *Holifield v. Reno*, 115 F.3d 1555, 1564 (11th Cir. 1997)). "This burden is one of production, not persuasion and consequently, the employer need only produce evidence that could allow a rational factfinder to conclude that the challenged employment action was not made for a discriminatory reason." *Id.*

Based only on her unfounded beliefs and without any support from the record, Petitioner hypothesizes that EquiCredit knew the Property was not owner occupied. To the contrary, Petitioner never informed EquiCredit that the Property was to be used solely as rental Property or that she did not plan to reside at the Property. (Doc 44 (Boykin Depo.)

- Pgs 28-29.) The undisputed facts of record clearly indicate that (i) at no point during the application process was EquiCredit aware of either Petitioner's race or the racial composition of the neighborhood where the property at issue is located; (ii) Petitioner's requested loan did present closing costs in excess of five percent of the loan amount; and (iii) EquiCredit's denial of Petitioner's loan application was based solely on its belief, right or wrong, that the proposed loan would have been a prohibited high-cost loan under New York law. (Doc 44 (Boykin Depo.) - Pgs 22, 25-27, 30-32, 63; R2-41 (Della-Loggia Dec.) -3 (& 4-6) (6-10).)

3. Petitioner Seeks Another Review of the Evidence After the Lower Courts Determined that the Evidence Showed Petitioner Did Not Meet Her Burden of Showing Pretext.

Finally, Petitioner claims that, applying the *McDonnell Douglas* framework and assuming Petitioner established her prima facie case and EquiCredit met its burden of proffering a legitimate, nondiscriminatory reason, Petitioner met her burden of persuading the court that EquiCredit's proffered reason was pretext for discrimination. (Pet. at 9.) According to Petitioner, she "clearly demonstrated" that EquiCredit's reason was "pretext, unworthy of credence, and could not be the real reason for her loan denial," and the lower courts failed to evaluate all of her evidence. (*Id.* at 10.)

Petitioner's conclusory assertions again are simply wrong and have no basis in the record. In the proceedings below, Petitioner repeatedly admitted that she did not have any evidence of discrimination, just her own belief that discrimination occurred. (Doc 44 (Boykin Depo.) - Pgs 32, 33, 35, 38, 40, 53, 55.) Her reliance on her beliefs and

conclusory allegations of discrimination are insufficient to raise an inference of pretext to survive summary judgment. *Grisby v. Reynolds Metals Co.*, 821 F.2d 590, 597 (11th Cir. 1987). Indeed, Petitioner conceded below that she had not been able to prove EquiCredit's reason for denying the loan application was a pretext for discrimination. (R3-46-2) (Memo. of Law) -5.)

Petitioner had to do more than show EquiCredit was "wrong in its assessment of the underlying facts or was otherwise lacking in wisdom" in its decision to deny her loan. *See Cooley v. Sterling Bank*, 280 F. Supp.2d 1331, at 1342 (M.D. Ala. 2003) (quoting *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991)), *aff'd per curiam*, 116 Fed. Appx. 242 (11th Cir. 2004). The record showed that EquiCredit was neither aware of Petitioner's race nor the racial makeup of the neighborhood in which the Property is located, none of the documents relied on by EquiCredit to make its decision indicated Petitioner's race or the racial makeup of the neighborhood, and Petitioner has admitted that EquiCredit did not ask for her race or gender information. (District Court's May 23, 2005 Opinion at 8a, 14a.) Moreover, EquiCredit's parent, Bank of America, N.A., was and still is Petitioner's home loan lender on her residence in Georgia. (R1-1 (Compl.) -4 (6); Doc 44 (Boykin Depo.) -Pgs 15-16, 19-20; R2-41 (Della Loggia Dec.) -8 (14).) Nothing in the record suggests a discriminatory pattern.

III. Petitioner's Case Does Not Merit the Court's Attention.

Lacking any true and non-illusory conflict between the decisions below and any decision of this Court or another Court of Appeals, Petitioner is left to plea for review by the Court on the basis that her case is the appropriate vehicle for addressing various alleged issues of national importance. This case does not merit the Court's attention. Invoking a lofty statement,

Petitioner implores the Court to "promulgate and enforce our nation's fair housing policy" by providing uniform standards for government agencies as well as uniform and standardized definitions for various terms used in the *McDonnell Douglas* analysis. To the contrary, this Court has set a uniform standard for measuring allegations of discrimination and nothing at issue in Petitioner's case requires the Court to go beyond what it has already done. Petitioner's case is wholly without merit and unsupported by any evidence, and manifestly does not warrant this Court's review.

CONCLUSION

Petitioner has not carried her burden of demonstrating that the Eleventh Circuit's Opinion conflicts with a decision of any Court of Appeals or this Court or that it implicates an important question of federal law that has not been, but should be settled by this Court. Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

WILLIAM J. HOLLEY, II
Counsel of Record
CHARLES W. LYONS
C. MELISSA EWING
PARKER, HUDSON,
RAINER & DOBBS LLP
1500 Marquis Two Tower
285 Peachtree Center Avenue, N.E.
Atlanta, GA 30303
(404) 523-5300

Counsel for Respondents